UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
For Appropriate Relief

Appointment of Requested Defense Expert Witness Dr. Roy Malpass in the Fields of Human memory, Suggestibility and Confirmation Bias, and Eye-witness Testimony

21 August 2008

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the Military Judge's 19 June 2008 scheduling order.

2. Relief Sought: The defense respectfully requests that this Commission order the appointment of Dr. Roy Malpass to work as an expert witness for the defense in the fields of human memory, suggestibility and confirmation bias, and eye-witness testimony.

3. Burdens of Proof & Persuasion: The Defense bears the burden of establishing that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). "[T]he burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence." R.M.C. 905(c)(2).

4. Facts:

a. The government is expected to rely on the statements and testimony of various members of the U.S. Army, who are held out as eye-witnesses to the firefight in which Mr. Khadr was captured. These statements underlie the most serious allegations against him. (*See* Prosecution Witness List (Attachment A).) With the exception of the After Action Report provided by LTC W., who was not a first-hand witness to the events within the compound or the fatal wounding of SFC Speer, nearly all of the remaining statements containing information regarding the last portion of the firefight during which SFC Speer was mortally wounded, were taken years after the events. Twenty-one of them were taken more than three years after the firefight, five of them were taken approximately one year and eight months after the firefight and one was taken eight months after the event.[1]

b. On 17 August 2008, defense counsel requested the Convening Authority's approval for funding for Dr. Roy Malpass as an expert witness in the field of human memory, suggestibility and eye-witness testimony. (Def. Request for Appointment of Dr. Malpass, 17 Aug 08 (Attachment B).) Dr. Malpass is Professor of Psychology and Criminal Justice at University of Texas at El Paso. He has served as Editor of the Journal of Cross-Cultural

[1] Due to their volume, the defense has elected not to attach all the witness statements to this motion.

Psychology (1982-1986), President of the Society for Cross-Cultural Research (1989 - 1990) and President of the International Association for Cross-Cultural Psychology (1992 - 1994). He was the founding President of the Psychology and Law Division of the International Association for Applied Psychology (1988-1998). He served as a member of the Technical Working Group on Eyewitness Evidence in the National Institute of Justice, and served as advisor and analyst for the The Illinois Pilot Program on Sequential Double-Blind Identification Procedures during 2005-2006. He is the author of numerous academic publications, including on eye-witness testimony and the factors that influence erroneous memory. He has also testified as an expert in dozens of criminal trials and courts-martial. (Malpass CV (Attachment B, enclosure 1).)

c. On 20 August 2008, the convening authority denied the defense request for funding for Dr. Malpass. (Convening Authority's Memo, 20 Aug 08 (Attachment C).) The asserted basis was the Dr. Malpass' testimony would not be necessary because "the average panel member is aware that perception is not always accurate, and that memories may fade. This does not require expert testimony." (*Id*.)

5. <u>Argument</u>:

a. Standard for Authorization of Defense Experts

(1) The MCA and the Manual for Military Commissions authorize the employment of experts to assist the parties in both the development and presentation of their cases. R.M.C. 703(d). In order to employ an expert at Government expense, a party must submit a request to the convening authority to authorize and to fix the compensation for the expert. A request denied by the convening authority may be reviewed by the military judge, who shall determine whether the testimony of the expert is relevant and necessary. R.M.C. 703(d).

(2) R.M.C. 703(d) requires the moving party to show that the expert is relevant and necessary. This standard is identical to the standard for the employment of experts set forth in the Manual for Courts-Martial. *Compare* R.M.C. 703(d) *with* R.C.M. 703(d).

(3) Once the defense has made a showing that the expert is both relevant and necessary, the Government must either provide the expert or an adequate substitute. *United States v. Tornowski*, 29 M.J. 578, 580-81 (A.F.C.M.R. 1989). Where the Government seeks a substitute, that person must possess similar professional qualifications as the requested witness. *United States v. Robinson*, 24 M.J. 649 (N.M.C.M.R. 1987); *United States v. Tone*, 28 M.J. 1059 (N.M.C.M.R. 1989). Under some circumstances, independent experts cannot be replaced by government experts. *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990) (noting that government-appointed consultant was not an adequate substitute for the independent assistance that the expert requested by the defense would have provided).

b. The Expert Testimony of Dr. Malpass is Relevant

(1) "Relevance" is defined by the M.C.R.E. as having "probative value to a reasonable person," which means that "when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence." M.C.R.E. 401.

(2) The memories of the witnesses upon whom the government intends to rely in reconstructing the events surrounding the death of SFC Speer will be the central testimonial evidence of this case. Insofar as the government has not alerted the defense to any witness who actually claims to have seen Mr. Khadr throw a hand grenade during the battle (or in any other way commit belligerent acts), the government's theory of the case apparently rests upon the "angles" at which and from which witnesses claim they saw or heard a grenade thrown and detonate, as well as the precise positions of specific U.S. and enemy fighters within the compound at that moment. The precision of this testimony is essential as there were at least two enemy combatants alive at the time the grenade was allegedly thrown and both were located in a narrow alcove. (*See* OC-1 Statement (Attachment B to Def. Rep. D-022).) In fact, the statement of one Special Forces soldier, OC-1, refers to another fighter who was not only alive, but actively engaging U.S. forces as they penetrated the compound. (*See id*.) The precise recollection by these witnesses of the sequencing of events, the position of individuals throughout the compound, and the trajectory and sound of the grenade are all essential to proving the government's case.

(i) In its depositions and interviews of material witnesses, however, defense counsel has discovered that witnesses routinely (and understandably) cannot recall events that transpired six years ago. LTC W., for example, repeatedly stated during his deposition that he could not recall significant events, individuals or information that was squarely relevant to the government's theory of the case. (*See e.g.*, LTC W. Deposition, at 30-31, 67, 74-75, 84-90, 93, 96-102, 104, 114, 124-25, 135, 142, 156-57, 161, 172-73, 185-86, (Attachment B, enclosure 2).)

(ii) Worse than the faded memories of potential witnesses, however, are the contaminated and selective ones.

(A) This case has received extensive media coverage and is the subject of a civil lawsuit against Mr. Khadr by two of the government's witnesses. During his deposition, LTC W explained that since the firefight, Mr. Khadr's name "keeps popping up" in the media and U.S. soldiers from the firefight would call or email each other to discuss what they had heard or read in the media. (LTC W. Deposition at 154-55; *see also id*. at 185-87 (explaining that after the firefight "I heard all sorts of things" about Khadr – "I just don't remember where or when or with who").)

(B) Another of the witnesses, Sergeant First Class (SFC) [redacted], is noteworthy as a frequent public purveyor of the myth that Mr. Khadr was the sole enemy in the compound to have survived the aerial bombardment on 27 July 2002, thus implying that Mr. Khadr must have been responsible for SFC Speer's death. When SFC [redacted] was confronted with the revelation in February 2008 that at least one other enemy combatant was alive and fighting when U.S. forces entered the compound, he said that he was "shocked" and that this contradicted what "everyone had told" him over the years. *See Injured U.S. soldier "shocked" Khadr wasn't alone*, Toronto Star, Feb. 6, 2008.[2]

[2] *Available at:* http://www.thestar.com/comment/columnists/article/301161.

(C) Even today, SFC [redacted] continues to state publicly that "Omar pops up, throws the grenade, shoots the pistol, the grenade goes off, somebody returns fire hitting Omar a couple of times, he goes down and there's no one else in the compound." Susan Ormiston, *The Battle for Omar Khadr*, THE NATIONAL (CBC), 16 June 2008;[3] *see also* Stewart Bell, *Khadr 'earned' Guantanamo stay, says soldier*, NATIONAL POST, 15 July 2008,[4] ("My lasting image of Omar is of him crouched in the rubble waiting for U.S. troops to get close enough so he could take one of them out."). This account is squarely at odds with uncontested facts such as Mr. Khadr being shot in the back while hunched over a pile of rubble, (*see* OC-1 Statement), Mr. Khadr suffering significant injuries to his lower extremities that prevented him from even standing, let alone "popping up", (*see* Agent Notes, 8 Dec 08 (Attachment D)), or Mr. Khadr being the sole survivor, (*See* OC-1 Statement).

(iii) Compounding the already tainted atmosphere surrounding this case, 17 of the 29 witnesses interviewed in connection with this case had their statements taken *after* the 2005 charges had been referred. Three or more years after the relevant events and even under the best circumstances, the knowledge of such charges and trial counsel's theory of the case would skew both the witnesses' ability to recall events years prior as well as the neutrality and openness of the investigators' questions. As Dr. Malpass testimony will explain, the information given to people about to engage in a memory task (both storing or retrieving a memory) can have dramatic effects on the manner in which they extract information from their environment and therefore on what is available for subsequent recognition or recall.

(3) Trial counsel also intends to rely upon interrogation summaries taken over the course of Mr. Khadr's six-year detention and summaries of interviews with prospective witnesses. These summaries will be either admitted themselves into evidence or be used as the basis for the testimony of interrogators and witnesses. Most of these summaries, however, were prepared hours and days after the interviews and interrogations, meaning that the individual preparing the summary was filling in gaps from memory and Analyst Support Packages rather than a contemporaneous recording of the statements. Moreover, most of the notes the interrogator or interviewer used in preparing these summaries have since been lost or destroyed. (Email of Maj. Groharing (attachment E).) For the interrogations where the notes are available, there are significant omissions and additions.[5] Those types of editorial choices are now wholly lost for the vast majority of the interrogation summaries, and how those types of editorial choices would get made, either in relying upon ASPs or just memory, is crucial in establishing or impeaching their reliability as evidence.

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[3] *Available at:* http://www.cbc.ca/national/blog/video/militaryafghanistan/the_battle_for_omar_khadr.html.

[4] *Available at:* http://www.nationalpost.com/news/ story.html?id=656852.

[5] *Compare* Agent Notes, dated 8 December 2004 (attachment D) *with* CITF Report of Investigative Activity, dated 8 December 2004 (attachment F) (CITF Report). For example, the CITF Report states "During this time period the men put on vests that carried ammunition and retrieved their AK-47 assault rifles. KHADR was given an AK-47 rifle, put on an ammunition vest, and took a position by the window nearest to the door of the residence." (CITF Report at 1.) The notes, however, describe "Soldiers got ready for the Americans (i.e. weapons, jackets)." (Agent Notes at 1.) Likewise, the Agent Notes describe "Planes wounded him also (legs + feet). He was grabbed and placed in the alley." (Agent Notes at 2.) Nowhere in the CITF Report is he described as being this wounded or, crucially, so immobilized that he had to be "grabbed and placed."

(4) Dr. Malpass is one of the world's leading experts on the means by which time, circumstances and incentives contaminate witness memories in involuntary and subtle ways. He will review the statements made by the government's witnesses years after the fact, and compare them with contemporaneous statements, records and news accounts. His expert testimony will demonstrate that the contemporary research into the cognitive science of memory cast significant doubt on the degree to which the testimony of the interrogators and witnesses to the July 2002 firefight should be relied upon as independent support for the government's theory of the case. His testimony will also discuss how interrogators' written summaries of their interrogations of Mr. Khadr may have been shaped by confirmation bias, a problem that is explained below.

(i) Dr. Malpass will describe in detail how modern cognitive science has found that human memory is created by a three-phase process: acquisition, retention and retrieval. He will explain that various psychological conditions can impact individuals' cognitive representation of events differently and in often counter-intuitive ways at each of these three phases. In particular, conditions such as time, stress, violence, emotional arousal, expectations and social stereotypes can lead to loss of memory for details and the creation of false memories. These false memories are assumptions made in the face of uncertainty that have taken on mental reality, which though sincerely believed, are not faithful reflections of an individual's actual perception of events.

(ii) Dr. Malpass will demonstrate how the psychological conditions presented in this case cast significant doubt on even the supposedly "clear" memories many of the witnesses claim to have. He will testify that the record shows many of the risk factors that would make these "memories" nothing more than reconstructions compiled from fragments of the witnesses' own memories, information made available to them from news accounts, conversation and rumor in the weeks, months and years after the events, brought together by the government's narrative that filled important gaps over who was to blame, and reinforced by a desire to vindicate the death of their fallen brother.

(iii) Dr. Malpass will be able to describe how psychological effects such as "confirmation bias" will undermine the reliability of these statements. As with eye-witness testimony generally, an individual preparing a summary of an event later will piece together recollections that will be largely skewed to fit with an overarching belief the individual is predisposed to have about the events. Dr. Malpass will be able to review individual interrogation summaries to detect patterns of investigator bias and "gap-filling" that undermine their validity as evidence at trial or as the basis for refreshing the recollections of live witnesses.

(iv) Dr. Malpass will explain how the extended period of time between the events themselves, the "acquisition" phase, and when these individuals were first interviewed, the "retrieval" phase, strongly suggests that these statements were reconstructed narratives of events, rather than reporting of observations. Likewise, though the stress of the firefight would make the split-second events nearly imperceptible from a cognitive point of view, they would have created an enormous psychological demand for rational explanation in the hours and weeks after they transpired. Combined with stereotypes about the nature of the enemy, Dr. Malpass will explain how the opportunity was ripe for filling the many gaps with a convenient, honest, but wrong belief about what happened.

c. The Expert Testimony of Dr. Malpass is Necessary

(1) An expert is deemed necessary when the defendant shows that there is more than a "mere possibility" of assistance from a requested expert. *United States v. Robinson*, 39 M.J. 88, 89 (C.M.R. 1994); *United States v. Kinsler*, 24 M.J. 855, 856 (A.C.M.R. 1987). To demonstrate that the testimony is necessary, the defense must show that it "would contribute to [ ] [the defense's] presentation of the case in some positive way on a matter in issue." *United States v. Reece*, 25 M.J. 93, 94 (1987).

(2) The government has no physical evidence indicating what kind of ordnance killed SFC Speer. Nor does the government have any eye-witnesses who will testify that they saw Mr. Khadr throw a hand-grenade. The government's entire case is based upon split-second accounts of grenades being thrown by both sides, the sequencing of enemy and U.S. fire and the pitch of ordnance perceived at a distance and while the witnesses were moving. The government's case is therefore entirely circumstantial and delicately so. A belief by the members that a witness's memory is even slightly distorted casts the government's whole theory of where, when and what Mr. Khadr did into doubt.

(i) The need for expert testimony on the reliability of the eye-witness statements taken three years or more after the relevant events and eye-witness testimony given more than six years after the relevant events is necessary to impeach the only evidence, other than statements Mr. Khadr's is alleged to have given under coercion, upon which the government can rely in proving its case. The memories witnesses have of sudden, high stress and highly publicized events are often not as much a product of their observation as they are narratives the witnesses come to believe. He will testify that these narratives are highly suggestible, and even though a witness may be giving their honest recollection of events, that that recollection may be entirely wrong and rooted in nothing more than the influence of stress and the passage of time on the brain and its effort to make sense of traumatic events.

(ii) Contrary to the Convening Authority's conclusion, this testimony is regularly admitted because the myriad factors that affect long-term memory are neither "common knowledge" nor adequately substituted for by cross-examination by defense counsel. Defense counsel does not have the advanced degrees and decades of research that Dr. Malpass has demonstrated as an expert witness in numerous trials and court-martials. (*See* Malpass CV (Attachment B, enclosure 1).) Nor could the substance of his testimony be elicited from other witnesses on cross-examination. Dr. Malpass' testimony is necessary to provide the members with the benefit of the science underlying the way memory works and to detect subtle patterns of "gap-filling" either by the investigator or the witness in statements that were taken years after the fact. This is not a simply function of showing that a witness' memory "faded," but why a witness could have a "clear" memory that was simply wrong.

(iii) Many of the scientific findings about which Dr. Malpass will testify are not within the understanding and knowledge of the average lay person. Rather, the findings are frequently counterintuitive. "Expert testimony on eyewitness reliability is not simply a recitation of facts available through common knowledge. Indeed, the conclusions of the psychological studies are largely counter-intuitive, and serve to explode common myths about an individual's capacity for perception." *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir.

1986). Common beliefs about the accuracy of perception during stress, *see, e.g., United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1986), *cert. denied*, 484 U.S. 1017 (1988), about the possibility of fusing images perceived at different times into a single memory image, *see, e.g., United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984), and about the rates at which observers forget what they have observed, *see, e.g., United States v. Downing*, 753 F.2d 1224, 1231 (3d Cir. 1985), are inconsistent with the results of the psychological studies.

(3) Dr. Malpass' testimony is also highly relevant to providing the members with a clear picture of how interrogation and interview summaries are actually made and the influences that can affect their reliability. Since the Rules for Military Commission allow the summaries to be admitted as evidence, the need for expert testimony is all the more acute since defense counsel may have no ability to impeach or examine the credibility of the investigators or interrogators who prepared them. Dr. Malpass' testimony is therefore both relevant and necessary to providing Mr. Khadr a meaningful opportunity to challenge the government's evidence against him. Especially given the presumption of candor that the government's witnesses will likely have before the members, Dr. Malpass' testimony is necessary to make clear why their testimony may be false or incomplete, even if provided in good faith.

6. Oral Argument: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions." Oral argument will allow for thorough consideration of the issues raised by this motion.

7. Witnesses & Evidence: The defense does not anticipate the need to call witnesses in connection with this motion. The defense relies on the following documents as evidence in support of this motion:

Attachments A through F

OC-1 Statement (attachment B to Def. Rep. D-022)

8. Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

9. Additional Information: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

10. Attachments:

A. Prosecution Witness List
B. Def. Request for Appointment of Dr. Malpass, 17 August 2008
C. Convening Authority's Memo, 20 August 2008
D. Agent Notes, 8 December 2008, Bates # 00766-008455-008459

E. Email of Maj. Groharing
F. CITF Report of Investigative Activity, dated 8 December 2004

/s/
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UNITED STATES OF AMERICA **v.** **OMAR AHMED KHADR** **a/k/a "Akhbar Farhad"** **a/k/a "Akhbar Farnad"** **a/k/a "Ahmed Muhammed Khali"**	**D-084** **GOVERNMENT'S RESPONSE** **To the Defense Motion to Appoint a Witness in the Fields of Human Memory, Suggestibility and Confirmation Bias and Eye-Witness Testimony (Dr. Malpass)** **3 September 2008**

1. Timeliness: This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b).

2. Relief Requested: The Government respectfully submits that the Defense's motion to order the appointment of a witness in the field of human memory, suggestibility, confirmation bias and eye-witness testimony should be denied because it does not assist the trier of fact.

3. Overview: There is every reason to believe that skillful cross-examination by the Defense will serve as an equally, if not more, effective tool for testing the reliability of the government's witnesses at trial in this case than the appointment of an expert witness in human memory. The proposed testimony of Dr. Malpass concerns matters that are squarely within the comprehension of the average juror. It is no secret that memory decreases over time, that individuals can selectively remember or even fabricate events, or that stress, bias and time delay can have an impact on memory or perception

4. Burden and Persuasion: As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rules for Military Commissions ("RMC") 905(c)(1), 905(c)(2)(A).

5. Facts:

a. In the instant motion, the accused seeks to appoint and then introduce the testimony of Dr. Roy Malpass in the fields of human memory, suggestibility and confirmation bias and eye-witness testimony. The government does not quibble with Dr. Malpass' expertise concerning research into memory, particularly with respect to the reliability of eyewitness identification. Nor does the government quarrel with the abstract or general proposition that expert testimony may be limited to presenting general principles of a field of research without rendering an opinion applying the principles to the facts of the case on trial. The basis for the government's objection to Dr. Malpass' appointment as an expert witness for the Defense and his proffered testimony is that the accused cannot meet his burden as the proponent of the evidence of establishing that the testimony will assist the jury in understanding or determining any of the facts at issue in this case.

6. Discussion:

a. Juries and military members in virtually every criminal case assess the memory and credibility of eye-witnesses and law enforcement interviewers without a lengthy explanation of the current state of research into human memory. As will the military members in this case, juries and members in many cases are called upon to evaluate differing versions of events and to sort out which version to believe and which version to discount because the witnesses may be mistaken or may be lying. Members are not routinely, or even rarely, presented with extensive testimony on research into memory in cases like this one. Members can evaluate competing versions of events, through witness testimony and other evidence, applying their collective common sense in light of the adversarial presentations of the parties, including arguments of counsel, and the instructions of the trial judge. The accused does not come close to establishing that a detailed inquiry into the academic state of memory research will, on balance, assist the trier of fact. To the contrary, there are strong reasons to believe that the requested appointment and proffered testimony may confuse, mislead, and unduly influence the military members in their role as judges of the facts.

b. This Commission has substantial discretion to decide whether expert testimony is admissible, and whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or considerations of undue delay and waste of time. In this case, far from being an abuse of discretion, excluding the requested appointment and proffered testimony is the correct decision.

i. Summary of Applicable Law

a. In these proceedings, the admissibility of expert testimony is governed by R.M.C. 703.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. A proponent must first demonstrate that the proffered expert is qualified as an expert by knowledge, skill, experience, training, or education to render his or her opinions. Next, the proponent must satisfy the court that the proffered testimony is both relevant and necessary. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993).

b. The Supreme Court has insisted that the trial court act as a "gatekeeper," ensuring that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589. *See also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999); and General Electric Co. v. Joiner, 522 U.S. 136, 142 (1997). R.M.C. 703(d) sets a similar standard of relevance and necessity. The proponent of the testimony bears the burden of establishing to the trial judge that "the pertinent admissibility requirements are met by a preponderance of the evidence." Bourjaily v. United States, 483 U.S. 171 (1987). The decision whether to admit or exclude expert testimony is within the broad discretion of this Commission. *See* General Electric Co. v. Joiner, 522 U.S. at 136-37; United States v. Washington, 106 F.3d 983, 1008 (D.C. Cir. 1997).

c. In evaluating whether expert testimony is reliable, the Commission should consider the following non-exhaustive list of factors: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the method's known or potential rate of error; (4) the existence of standards controlling the technique's operation; and (5) whether the theory or technique finds general acceptance in the relevant scientific community. Daubert, 509 U.S. at 592-94; Ambrosini v. Labarraque, 101 F.3d 129, 134 (D.C. Cir. 1996) (approving admission of expert testimony linking Depo-Provera with plaintiff's birth defects based on Daubert analysis). *See also* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999) (approving district court's exclusion of expert testimony as unreliable based on flexible application of Daubert factors). There also must be "a sufficiently rigorous analytical connection between the expert's methodology and the conclusions to which the proponent seeks to elicit from the expert." Nimely v. City of New York,14 F.3d 381, 396 (2d Cir. 2005). "[N]othing in Daubert requires any court or this Commission to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997) (approving exclusion of expert testimony as unreliable where studies offered in support of expert's conclusion dissimilar to facts of case). Thus, an expert opinion that is based on data, methodology or studies that are inadequate to support the conclusions reached must be excluded as unreliable. Nimely,14 F.3d at 396-97 (holding that admission of expert testimony that officer could have innocently misremembered suspect's turning and facing him as happening before or simultaneously with, rather than after, his firing of shot was abuse of discretion requiring reversal).

d. Even if this Commission finds that a proffered expert is qualified and his testimony is reliable, the testimony may not be admitted unless the Commission also finds that the testimony will assist the trier of fact. Expert testimony assists the trier of fact if: (1) the testimony is relevant; (2) the testimony is **not** within the jurors' common knowledge and experience; and (3) the testimony will not usurp the members' role of evaluating a witness's credibility. United States v. Rodriguez-Felix, 450 F.3d 1117, 1123 (10th Cir. 2006). Expert testimony is relevant if the "reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 593; Ambrosini, 101 F.3d at 134. As the Court in Daubert cautioned, "'Fit' is not always obvious, and scientific

validity for one purpose is not necessarily scientific validity for other, unrelated purposes.'" *Id.* at 591.

e. Expert testimony may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *See, e.g.,* United States v. Stokes, 388 F.3d 21, 26 (1st Cir. 2004) (instructing trial courts to consider threat of confusion, misleading of the jury, or unnecessary delay posed by eyewitness expert testimony) (reversed on other grounds). The Supreme Court has recognized, "expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it," and therefore, "the judge in weighing possible prejudice against probative force exercises more control over experts than over lay witnesses." Daubert, 509 U.S. at 595. Therefore, as the Second Circuit commented, "the very breadth of the discretion accorded trial judges in admitting [expert testimony] should cause them to give the matter more, rather than less, scrutiny." Nimely, 414 F.3d at 397 (quoting United States v.Young, 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring)).

ii. No Special Circumstances Warrant the Admission of Expert Testimony On Memory in this Case.

a. Absent special circumstances raising factual issues beyond the common knowledge and experience of jurors, expert testimony on memory consistently has been rejected, with the courts holding that issues related to faulty memory are adequately addressed through cross-examination of witnesses and jury instructions. *See, e.g.,* United States v. Carter, 410 F.3d 942, 950-51 (7th Cir. 2005) (holding that cross-examination and jury instructions eliminated the need for expert testimony).

b. Research reveals only one federal case from the District of Columbia in which the court addressed the question of the admissibility of expert testimony in detail regarding memory. That case, Robertson v. McCloskey, 676 F. Supp. 351 (D.D.C. 1988) (Green, J.), involved a libel suit related to events that occurred 38 years earlier, during the Korean War. The plaintiff sought to present expert testimony regarding "the psychodynamics of memory and perception" and "the factors that bear on the reliability of recollections." *Id.* at 352. In particular, the plaintiff sought to have the expert testify that the accuracy of memories diminishes over time, and that a person can reconstruct or even fabricate details of complex events that took place long ago. *Id.*

c. The court in *Robertson* excluded the proposed expert testimony on the ground that the testimony involved matters of common sense and was not sufficiently tied to the facts of the case. Needless to say, appellate decisions, relied on by the Defense, affirming the admission of expert testimony do not stand for the proposition that excluding the evidence would have been an abuse of discretion.

d. The bulk of the Defense's proposed expert testimony concerns matters that are squarely within the comprehension of the average juror. It is no secret that memory decreases over time, that individuals can selectively remember or even fabricate events, or that stress can have an impact on memory or perception. Therefore, the *Robertson* court concluded, the expert's testimony would merely prolong the trial and could potentially confuse the jury. *Id.* at 354-55.

e. Finding that expert testimony is relevant and admissible in this case would not only be extraordinary, it would also supply authority for the admission of such testimony in virtually all cases – criminal and civil – as it is the rare case in which the perceptions and memories of witnesses are not challenged. This is not, and cannot be, the law. *See* Krist v. Eli Lilly and Co., 897 F.2d 293, 298 (7th Cir. 1991) (stating, "Certainly in routine cases the trial judge is not required to allow wide-ranging inquiry into the mysteries of human perception and recollection.").

f. There is every reason to believe that skillful cross-examination by the Defense will serve as an equally, if not more, effective tool for testing the reliability of the witnesses at trial in this case. Rodriguez-Felix, 450 F.3d at 1125 ("Jurors, assisted by skillful cross-examination, are quite capable of using their common-sense and faculties of observation" to determine the reliability of a witness's identification) (citing Smith, 156 F.3d at 1053 and Hall, 165 F.3d at 1107). *See also* United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (affirming the exclusion of testimony offered by defendant in securities fraud case to explain "how well or how poorly people are able to remember things the way that they do" on the ground that "[t]he average person is able to understand that people forget; thus, a faulty memory is a matter for cross-examination."). In addition, if necessary, jury instructions may be provided to the jury. *See, e.g.*, United States v. Thomas, 713 F.2d 604, 607-08 (10th Cir.1983); United States v. Rincon, 28 F.3d 921 (9th Cir. 1994)(holding that even informative expert testimony that is counter-intuitive may not "assist the trier of fact" if the court conveys the same information by means of jury instructions).

iii. The Proposed Testimony is Inadmissible Because It Is Limited to Matters of Common Knowledge and Experience.

a. Expert testimony that is limited to matters of general knowledge is not admissible because it is not useful to the trier of fact. United States v. Mitchell, 49 F.3d 769, (D.C. Cir. 1995)(upholding exclusion of expert linguistics testimony where recorded conversation in evidence and contents within common understanding of jury); United States v. McDonald, 933 F.2d 1519, 1522 (10th Cir.1991); United States v. Welch, 368 F.3d 970, 974 (7th Cir. 2004) (noting that "[w]here expert testimony addresses an issue of which the jury is already generally aware, such testimony does not assist the jury") (internal quotation marks omitted) (overruled on other grounds); United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (excluding expert testimony because "the average person is able to understand that people forget").

b. Similarly, expert testimony that duplicates arguments available to counsel for the parties is not helpful to the trier of fact. United States v. Frazier, 387 F.3d 1244, 1262-63 (11th Cir. 2004)("Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments.").

c. Many courts have noted that jurors are generally aware of most issues related to faulty memory. *See* Robertson, 676 F. Supp. at 352; United States v. Stokes, 388 F.3d 32 (2004) (affirming exclusion of expert testimony given that psychological factors that affect memory are generally known to jurors); United States v. Welch, 368 F.3d 970 (2004) (reversed on other grounds); United States v. Hall, 165 F.3d 1095 (8th Cir. 1999) (noting that general reliability of eyewitness identification is matter of common understanding).

d. As indicated by these decisions, jurors and our members are generally familiar with the information needed to assess the reliability of witness testimony. Members understand that people sometimes forget, that memory is imperfect, and that memories fade with the passage of time. *See*, *e.g.*, United States v. Labansat, 94 F.3d 527, 530 (9th Cir. 1996) (affirming exclusion of expert testimony regarding eyewitness identification on ground that "[i]t is common knowledge that memory fades with time"); United States v. Rosenberg, 297 F.2d 760, 763 (3d Cir. 1958) (holding that failure to disclose pretrial statement of witness admitting that her recollection had faded over time did not violate Brady where that fact was one of "universal experience and common knowledge, of which the jury must have been aware in any event"). It is common knowledge that people can forget things and confuse details, especially when they are focused on other matters. Doyal v. Oklahoma Heart, Inc., 213 F.3d 492, 497 (10th Cir. 2000) (noting in context of wrongful termination suit that "[f]orgetfulness is an exceedingly common human frailty. Many of us tend to forget names. This is particularly so where we briefly meet a lot of different people….").

e. Our military members are well aware that people sometimes make mistakes about things they were told and/or who told them, that they sometimes selectively remember or even fabricate events, or that stress can have an impact on memory or perception. Robertson, 676 F. Supp. at 354. It is also common knowledge, even cliche, that people sometimes hear what they want to hear. Therefore, based on their own common sense, knowledge and experiences, members can understand that any witness might be mistaken when he or she tries in good faith to remember and testify about details of past events and conversations, and are unlikely to place undue reliance on a witness's confidence where other evidence indicates that witness's confidence in his or her own recollection is misplaced. None of these matters require explanation by an expert and, thus, the proposed testimony should be excluded. *See generally* United States v. Cruz, 981 F.2d 659 (2d Cir. 1992) (holding that the admission of expert testimony on the role of a "broker" in a drug deal was reversible error because it was limited to common knowledge, and was used essentially to bolster the credibility of the prosecution's central fact witness).

f. In most cases involving eyewitness identification, the accuracy of the identification is the central issue, and the member's determination of guilt or innocence rests heavily on the member's assessment of the identification's accuracy. Members are far less likely to be confused regarding the probative value of confidence. In assessing the accuracy of witness testimony in cases in which witnesses recount past events and conversations, members naturally consider a broader set of factors, including the degree to which witness testimony is corroborated by other evidence, indicia of bias, prior consistent and inconsistent statements, and aspects of the witnesses' demeanor other than apparent confidence.

g. The fact that members may be unaware of technical terms or scientific jargon, or of details regarding how memory processes function, does not mean they will be unable to understand the evidence or assess the reliability of the witnesses' testimony. To the contrary, scientific details regarding the function of memory are neither necessary nor helpful to the member's task.

h. In fact, the general knowledge members possess regarding memory equips them well to assess reliability and credibility, especially if aided by cross-examination and accurate instructions from this Commission. As the Supreme Court has stated, "[d]etermining the weight and credibility of witness testimony 'has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men," United States v. Scheffer, 523 U.S. 303, 313 (1998) (holding that per se rule prohibiting use of polygraph evidence in military courts did not violate defendant's rights under the Fifth and Sixth Amendments) (quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)).

iv. The Proposed Testimony is More Likely to Confuse, Mislead, or Unduly Influence the Jury.

a. Not only would the admission of the proposed testimony not be helpful to the members, it would also be confusing, misleading and prejudicial, and would unnecessarily delay the proceedings. As discussed above, the members do not need expert testimony regarding the mechanics of forgetting to understand that the accused or other witnesses may have forgotten details of the relevant events. Thus, the admission of expert testimony by the accused (and the resulting requirement that the government would need to present expert testimony on memory to rebut it) will protract the proceedings while offering nothing of value to the jury's fulfillment of its responsibility.

b. Admission of the proposed testimony would also give undue weight to the expert's testimony by cloaking it in an unwarranted "aura of special reliability and trustworthiness." United States v. Cruz, 363 F.3d 187, 194 (2d Cir. 2004) (citation and quotation marks omitted). *See also* United States v. Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004) (en banc), cert. denied, 125 S. Ct. 2516 (2005) ("Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors and, therefore, courts

must take care to weigh the value of such evidence against its potential to mislead or confuse."); Daubert, 509 U.S. at 595; United States v. Rodriguez-Berrios, 2006 WL 2336884 at (D. Puerto Rico, August 3, 2006) (noting that memory expert's testimony carries "a great deal of inherent reliability, which jurors can often confuse for infallibility").

c. Moreover, the admission of the proposed testimony would tend to make the members unduly skeptical of the testimony of all witnesses, and could encourage members to surrender their own common sense in weighing testimony. *See* United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973) (affirming exclusion of psychological evaluation of government witness proffered by defendant, expressing "grave doubt" that the testimony would have helped the jury, and noting that under the Constitution, "trial of criminal cases in Federal courts is by jury, not by experts."). Taken to its logical conclusion, Dr. Malpass' testimony could lead the jury to conclude that the inherent fallibility of memory is so great, that witness testimony regarding past events and conversations could never support a finding beyond a reasonable doubt and, to the contrary, would have to be disregarded.

d. Accordingly, even if this Commission were to find that the proposed testimony were relevant it should be excluded it because its probative value is far outweighed by the potential for confusing and misleading the members, and unnecessarily protracting the trial with unhelpful, lengthy testimony, involving battling government and defense witnesses on academic research regarding human memory.

7. Oral Argument: Should the Military Judge order the parties to present oral argument, the Government is prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: N/A.

10. Additional Information: None.

11. Submitted by:

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Department of Justice

UNITED STATES OF AMERICA	)	**ORDER**
	)	**Defense Motion for**
	)	**Appropriate Relief**
v.	)	**D084**
	)	
	)	Appointment of Requested Defense Expert
OMAR AHMED KHADR	)	Witness Dr. Roy Malpass in the Fields of
a/k/a "Akhbar Farhad"	)	Human Memory, Suggestibility and
a/k/a "Akhbar Farnad"	)	Confirmation Bias, and Eye-Witness
a/k/a "Ahmed Muhammed Khali"	)	Testimony

1. The Defense requests the Commission to order the appointment of Dr. Roy Malpass as an expert witness in the fields of human memory, suggestibility and confirmation bias, and eye-witness testimony. The Government opposes this motion.

2. Panel members in every criminal case judge the credibility of witnesses and determine how much weight the testimony of a particular witness should be given. A lay person, without expert assistance, understands such things as: the passing of time may impact the ability to remember; seeing something under stress may impact the ability to perceive an event accurately; a witness discussing an event with someone else or reading about it in the news is something to consider in determining whether that witness has an independent memory or is influenced by others; some people may have selective memory of events; or a person may not be a credible witness for other reasons.

3. Witnesses will be subjected to the crucible of cross examination. That time tested and effective tool used in our adversarial system is sufficient to meet the needs of the defense and satisfy the interests of justice. The Defense has not met its burden to show how the requested expert assistance in the requested field is necessary to insure a fair trial.

4. Accordingly, the motion is DENIED.

So Ordered this 18th day of September 2008.

Patrick J. Parrish
COL, JA
Military Judge